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In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. SCHMIDT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Claims.

PETITION AND ARGUMENT

FRANK L. NIKOLAY
ABBOTSFORD, WISCONSIN
Attorney for Petitioner

MARATHON PRESS, WAUSAU, WIS.

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On Petition for Writ of Certiorari to the United States Court of Claims, And Brief in Support Thereof.

OPINION BELOW

The opinion of the United States Court of Claims was rendered on May 3, 1961, and is not yet reported in the official Court of Claims report or the Federal Reporter.

JURISDICTION

The judgment of the United States Court of Claims was entered on May 3, 1961. On July 26, 1961, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark to September 30, 1961. The jurisdiction of this Court is invoked under the provisions of 28 USCA 1255.

QUESTIONS PRESENTED

1. Was the plaintiff's discharge as State Director of the Farmers Home Administration for the State of Wisconsin

based on his refusal to accept reassignment, unlawful because it was made for political reasons, and not to promote the good of the service?

2. Was it to the plaintiff's prejudice and a departure from the accepted and usual course of judicial proceedings to have sitting during oral argument a judge who was a former Republican politician from the State of Wisconsin, and active in Wisconsin politics during the time plaintiff's case was developing?

STATUTES INVOLVED

The Civil Service Act, Title 5 USCA and particularly 5 USCA 652 are applicable:

> Sec. 652. Removal without pay from classified Civil Service -- only for cause; notice; copy of charges; time to answer; examination; record; persons exempt.
>
> (a) No person in the classified Civil Service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavit; and (4) be furnished at the earliest practicable date with a written decision of such answer . . .

STATEMENT OF CASE

The petitioner seeks a review of the judgment of the United States Court of Claims dismissing the petition of the plaintiff under which the plaintiff sought judgment in his favor and against the United States for his salary as State Director of

the Farmers Home Administration for Wisconsin from July 19, 1955 to the present time.

The evidence in general may be summarized as follows: Plaintiff was appointed State Director of the Farmers Home Administration for the State of Wisconsin in 1946. Effective May 14, 1947, this position, which had been in an excepted status, was converted to competitive status.

Under date of January 13, 1955, the Wisconsin Member of the Republican National Committee addressed a letter to the Executive Secretary of the Republican Party of Wisconsin. This letter read as follows: "The present State Director of the Farmers Home Administration, whose name I have forgotten, has been transferred and the National Committee has requested the two senators for a recommendation for this position, sending me a copy of the letter to the senators. I think you should consult with Bill Merriam so that we can come up with a name as soon as possible." (Commissioner's Report, p. 4) Plaintiff had no prior knowledge of his impending removal as State Director of the Farmers Home Administration. At this time no position had been created for the plaintiff and no position as special assistant to the administrator of FHA had been fabricated. (Commissioner's Report, p. 5). The position created for the plaintiff in the Washington office of the Farmers Home Administration was never filled. (Tr. Record, p. 476).

Under date of March 17, 1955, plaintiff was advised of his reassignment to the Washington office of FHA by a formal letter. No travel authorization was included nor authorization to move the plaintiff's family, nor had plaintiff been given a performance rating as required. Under date of April 8, 1955, plaintiff replied to the notice of his reassignment in a letter that stated: "This will acknowledge your letter of March 17, 1955. Considering the very fine acceptance of the program under my leadership, the most excellent support that has been afforded me, and for personal and family reasons, I would

sincerely appreciate your reconsidering my being retained in Wisconsin as State Director."

Under date of April 27, 1955, the Assistant Administrator of the FHA replied to plaintiff's letter reaffirming the reassignment effective May 1, 1955.

Under date of May 2, 1955, the day he was supposed to report for duty in Washington, plaintiff wired FHA as follows: "Cannot accept reassignment. Appealing action." On the afternoon of the same day, the Assistant Administrator of the FHA wired plaintiff placing him on annual leave.

Under date of May 6, 1955, the Administrator of FHA wrote to plaintiff referring to plaintiff's refusal to accept his reassignment. In this letter he offered plaintiff the opportunity to resign his position if he preferred this to a recommendation that he be removed on charges. No reply was received to this letter and charges of insubordination were preferred against plaintiff by the Director of Personnel on June 2, 1955. Plaintiff exhausted his administrative remedies before the Civil Service Commission and an action was then brought in the Court of Claims under the provisions of 28 USCA 1491.

On oral argument before the Court of Claims, the Hon. James R. Durfee sat with the full Court, directed questions to the plaintiff's counsel and to counsel for the government and counsel for the government directed individual remarks to the Hon. Judge Durfee during the course of oral argument, specifically referring to the, "Political situation in Wisconsin", during the time that the plaintiff's case was developing. However, the Hon. Judge Durfee did not participate in the consideration and decision of this case, but he did participate during oral argument.

ARGUMENT

The Court Failed To Consider All Of The Evidence And Reached A Decision In Conflict With Existing Precedents And In A Departure From The Accepted And Usual Course Of Judicial Proceedings.

There are special and important reasons requiring a review of this case on writ of certiorari. Not only is there a conflict in the decision of the Court of Claims with existing Federal precedent, but the Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The important question of federal law involved concerns the growing inroads of spoils appointments upon the merit system in our Federal Career Civil Service.

There is a vast and rapidly growing body of laws, rules, regulations, methods, procedures, practices and traditions which make up the intricate mosaic of employer-employe relations in the Federal Civil Service.

Especially disturbing is the fact that the United States Civil Service Commission gave its approval to steps which cannot fail to undermine the merit principle. The removal of the plaintiff's position from the competitive Civil Service and the placing of it in Schedule A to make the jobs available for patronage appointment was nothing more than putting the position on the spoils block. The decision of the Court of Claims, (p. 2), states:

"We must assume that the reason assigned for plaintiff's transfer was bona fide, especially because the Civil Service Commission approved the recommendation."

The reason assigned was that the usual qualifications demanded by the duties of the position made it difficult to secure the right men by competitive examinations. This assumption

on the part of the Court of Claims is completely erroneous. The Assistant Administrator for operation, Farmers Home Administration, in his testimony (Tr. Record, p. 427) stated that an attempt had been made for several years after the removal of the state director's position from the competitive service to again put the state directors of the Farmers Home Administration under competitive service and remove such state directorship from Schedule A. The Director, Personnel Division, Farmers Home Administration, testified (Tr. Record, p. 457) that the director of the Farmers Home Administration wanted a freer hand to fill any vacancies that might come up; that is, he wanted to either promote within the agency, or he wanted to go out if he wasn't satisfied with promoting the people in the agency. In elaborating on this point, this same witness said: "And, while they were in the competitive service, he was not permitted to go on the outside. That was the two reasons that he said. In many ways now, there were other reasons, but that was his thinking as he described it to me."

There were only two ways for the Director of the Farmers Home Administration in Washington to create a vacancy at the state level. One would be to prefer charges, either for misconduct or inefficiency; and a second way would be to create a vacancy by transferring the plaintiff out of his position into another position. (Tr. Record, p. 457, 458).

At page 9 of the Court of Claims' opinion, the Court indicates that it can be reasonably inferred that a clash of personalities between the Administrator of Farmers Home Administration and the plaintiff developed over loan policies. The plaintiff and the Administrator of the Farmers Home Administration had only the remotest personal contact on one occasion in an elevator. How then, could a personality conflict develop? This idea of a personality conflict over lending policies was simply a crutch on which the Administrator of the FHA leaned to justify his actions taken against the plaintiff in attempting to reassign him.

The report of the commissioner (p. 4) indicates that a letter dated January 13, 1955, from the Republican National Committee and addressed to the Executive Secretary of the Republican Party of Wisconsin makes it clear that fully two weeks before a position was created in Washington for the plaintiff, the Republican Party of Wisconsin was advising its members that the plaintiff, "has been transferred and the National Committee has requested the two senators (Republican) for a recommendation for this position." It is patently obvious that even before the plaintiff's new position had been created, and this position was not created until February 2, 1955, (Report of Commissioner, p. 5), the responsible persons in the Washington office of the Farmers Home Administration considered the plaintiff as having been transferred. It is conceivable that the Republican Party of Wisconsin should have knowledge of the plaintiff's transfer even before a position for the plaintiff had been created unless responsible persons within the Farmers Home Administration had predetermined that the plaintiff was going to be transferred to Washington to make way for a Republican appointee in the State directorship of Wisconsin.

The decision of the Court of Claims, pointedly ignores one of the most significant pieces of evidence brought to light during the entire hearing. (Commissioner's Exhibit 1) This exhibit is a letter from Glen R. Davis, then a member of Congress, dated January 8, 1955. The letter refers to the position from which plaintiff was being reassigned. The Congressman indicates as follows:

"However, I did talk to some of the top fellows in the Farmers Home Administration in Washington who told me they had been in touch with Senator Wiley on this particular position and that they did feel here as if they did want to make a change if a suitable man could be found. *Tom has retention rights, and another spot in the Farmers Home Administration would be found for him* . . . (Emphasis ours). the change

will be made only if it has the clearance of our National Committeemen and our two United States Senators . . . .

"As I see it, it boils down to this: Do Ringling, Wiley and McCarthy wish to keep Tom or do they wish to replace him with some other suitable Republicans on which they can agree?"

Ignoring completely this significant piece of evidence certainly is such a departure from the accepted and usual course of judicial proceedings as to necessitate a review on writ of certiorari.

It is clear that the two United States senators, both of whom were Republicans on January 18, 1955, had complete control and mastery of the position which ostensibly was protected under Civil Service. The speciousness of the contention of the Farmers Home Administration employees that the plaintiff was being reassigned for the good of the service is all the more obvious in the light of the congressmman's letter. The action on the part of the Director of the Farmers Home Administration in recommending that the state directorship be excepted from the competitive service appeared to be the first of a series of moves to create jobs for spoils distribution by taking out of the competitive service positions which had long been under the merit system.

During the period, September, 1953, to December, 1955, the Farmers Home Administration made a change in some thirty states FHA directors. This was a turnover, " . . . a little heavier than the normal" (Transcript of the Record, p. 474). A national pattern had developed during the reign of the then national director of the Farmers Home Administration for replacing FHA state directors who had been appointed during a Democratic administration.

The decision of the Court of Claims is in conflict with *Knotts v. United States* 128 Ct. Cl. 489; 121 F. S. 630 (1954). In this case, as in the Knotts case, the facts here lead only to the conclusion that the reason for the plaintiff's discharge was

not his refusal to come to Wahington, but because the Administrator of the Farmers Home Administration at the Washington level wanted to get rid of him in order that the plaintiff could be replaced with a Republican appointee. To that end, the Administrator of the Farmers Home Administration initiated a transfer proceedings after discovering that in this particular instance he could not lightly disregard the merit Civil Service protecton afforded to the plaintiff.

If the reassignment of the plaintiff was to be, in fact, for the good of the service, it is peculiar that every witness who testified, either for the plaintiff or for the defendant, who dwelt at all on the quality of plaintiff's services as State Director, reflected the opinion that the plaintiff was operating one of the finest programs in the United States. The job he was supposed to take in Washington was never filled, even to this day, but a new position in lieu of it, and somewhat similar was created. It is fantastic to assume that the overall Farmers Home Administration program could have been improved by the plaintiff's reassignment to Washington. There is a great weight of evidence to show that plaintiff was being reassigned from motives of malice and for other reasons than for the good of the service. *Gadsen v. United States* 111 Ct. Cl. 487, 489, 490.

A review of the entire record in this case, will show that the Administrator of the FHA was arbitrary and capricious in dealing with the plaintiff. The report of the Commissioner shows that the plaintiff was dealt with in a "cavalier manner" in ordering his reassignment, without prior personal consultation and in being summarily ordered to report to Washington on May 2 on a three day notice which included the weekend. In addition, the plaintiff was not furnished the necessary documents for the transfer of his family and effects and when the stage had been set to perform the plaintiff's execution in the form of the refusal to accept the reassignment, he was promptly charged with insubordination. Plaintiff made numerous attempts to discuss his situation with the Director of the Farmer Home

Administration, but was never afforded such an opportunity. In fact, he had persons intercede for him to get such an appointment. In response to a simple request that the charge of insubordination be removed before he came to Washington, he received a summary telegram advising him that he had one more day to reconsider.

The Court of Claims decision completely ignores all of these background facts. In so doing, it has decided the case in a way in conflict with established decision in the *Knotts* and *Gadsen* Supra cases. The Court has not considered all of the evidence and, therefore, could not reach a fair conclusion.

The Plaintiff's Rights Were Prejudiced By Having A Wisconsin Judge Sit With The Court Of Claims During Oral Argument.

The printed opinion of the Court of Claims (Opinion p. 7) indicates that Durfee, Judge, took no part in the consideration and decision of this case. Nevertheless, Judge Durfee did sit on the bench with the full court during oral argument of the case. During the course of oral argument, the attorney for the defendant, United States, addressed remarks specifically to Judge Durfee and referred to the Judge's personal knowledge of the "political situation in Wisconsin" during the time that the facts in the plaintiff's case were developing.

Judge Durfee, prior to his elevation to the Federal Civil Aeronautics Board, had been a leading Republican politician in the State of Wisconsin for a number of years. In 1952-1955, when this petitioner's case was developing, Judge Durfee was a member of the Public Service Commission of Wisconsin, having been so appointed by a Republican governor.

With this Wisconsin political background and close association with members of the Republican Party in Wisconsin, the Hon. Judge Durfee nevertheless chose to sit on the bench during oral argument of the case being presented, and the attorney

for the government from time to time pointedly directed his remarks at Judge Durfee with reference to the "Wisconsin political situation". We have no way of knowing what effect the remarks of government counsel, as directed to Judge Durfee, might have had on the other members of the Court. Perhaps it had none, but no litigant under our American system of jurisprudence should have to subject himself to the possibility that a sitting Judge's political background might conceivably have an adverse affect on the litigant's case.

Undoubtedly, Judge Durfee would not have participated in the discussion of this case in chambers, and we do not question that he had no part in the actual decision of the case. However, he did have a part in the "consideration" of the case, in that his sitting on the bench during oral argument falls within the definition of the term "consideration" which, in practice, has the generally accepted meaning indicating that a tribunal has *heard* and judicially determined matters submitted to it. *Black's Law Dictionary*, Deluxe Third Edition (1944) p. 404.

There is no federal statute which prohibits a judge from sitting on a case before the Court of Claims where the judge has personal knowledge and personal contact with the parties. While 28 USCA 47 provides that no judge of the Court of Appeals shall hear an appeal from the decision of a case or issue tried by him, there is nothing comparable in the federal statutes governing Court of Claims cases. 28 USCA 47 disqualifies a judge who has once heard a cause upon its merits in the court of first instance from sitting in the Court of Appeals on the hearing and decision of any question, in the same cause, which involves in any degree matter upon which he had occasioned to pass in the lower court. *Delaney v. United States* 263 US 586; *Moran v. Dillingham*, 174 US 153. The disqualification arises not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the upper court to consider and pass on.

The situation of Judge Durfee, who had personal knowledge of the facts, sitting on the bench during oral argument, certainly parallels the very situation prohibited by federal statute where a Court of Appeals judge is involved.

Due process of law under our American System of Jurisprudence certainly requires a hearing before an impartial and disinterested tribunal. The litigant in this case should have been entitled to nothing less than the cold neutrality of an impartial Court. Even on oral argument, the litigant should be entitled to argue before a court so constituted that it will beget no suspicion of the fairness and integrity of that court. We believe that the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.

CONCLUSION

A writ of certiorari should issue directed to the Court of Claims commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Court of Claims had in the case numbered and entitled on its Docket, No. 142-57, *Thomas C. Schmidt v. United States,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Claims be reversed by the Court because:

1. The United States Court of Claims has overlooked substantial evidence pointing to a violation of Civil Service regulations on the attempted reassignment of the plaintiff.

2. A substantial federal question is involved under which the merit system in the Federal Government is facing a crisis. If this decision of the United States Court of Claims is permitted to stand notwithstanding the fact that the employer

in this instance violated a number of Civil Service rules and regulations in attempting to effect the reassignment, the use of government offices for patronage will become a handicap difficult to overestimate from the standpoint of those who strive to get better government. The precedent set here permits a special brand of personal patronage through which large cliques develop in departments and agencies such as the Farmers Home Administration as new administrators surround themselves with, "people they can trust" recruited without regard to Civil Service rules and regulations. Administrators, as was done in this particular case, may use the euphemism that it is for the "good of the service," but they fail to explain why such new appointees cannot conform to normal Civil Service rules and regulations. The Civil Service system has proven conclusively that it is flexible enough to provide for the competitive selection of employees in all but a tiny fraction of existing categories.

3. No judge should sit in on any case in which he or it is directly, or indirectly interested. It is an ancient maxim of the law that no man ought to be a judge in his own cause. In the instant case, while Judge Durfee took no part in the actual decision of this case, he did sit on the bench and counsel for the government directed part of his argument at Judge Durfee with personal reference to Judge Durfee's political relationships in Wisconsin during the time the facts in this case were being developed.

Under the circumstances, it is respectfully submitted, that the petition for a writ of certiorari should be granted.

FRANK L. NIKOLAY
Attorney for Petitioner

September, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 467

THOMAS C. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition and record in this case were not filed within the time prescribed by law. The judgment of the Court of Claims was entered on May 3, 1961. On July 26, 1961, Mr. Justice Clark extended the time for filing the petition for a writ of certiorari to and including September 30, 1961. The petition and record were not filed until October 3, 1961. The petition for a writ of certiorari should therefore be

denied for lack of jurisdiction under 28 U.S.C. 2101(c).[1]

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER 1961.

[1] Should the Court believe that the petition should not be denied as untimely filed, the government respectfully requests that it be given an opportunity to file a brief in opposition on the merits.

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No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. SCHMIDT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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MEMORANDUM REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FRANK L. NIKOLAY
COLBY, WISCONSIN
Attorney for Petitioner

MARATHON PRESS WAUSAU WIS

No. 467

In the Supreme Court of the United States

OCTOBER TERM, 1961

THOMAS C. SCHMIDT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

MEMORANDUM REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States has filed a memorandum in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Claims, alleging that the petition for a writ of certiorari should be denied for lack of jurisdiction under 28 U.S.C. 2101(c).

The deadline for filing the petition for a writ of certiorari in this action was September 30, 1961. The records in the office of the Clerk of the Supreme Court of the United States

will show that the petition for certiorari was in fact received at the office of the Clerk of Court on September 30, 1961, and that the transcript and exhibits were filed by the Clerk of the United States Court of Claims on October 3, 1961. A certified copy of the record was filed on October 4, 1961.

The affidavit of mailing, filed under the provisions of Rule 33 (3) clearly shows that the record in this case was mailed to the Clerk of the United States Supreme Court on October 2, 1961.

Under the provisions of Rule 33, it is our position that the "filing" required by Rule 21 of the Supreme Court Rules, is satisfied by depositing the record in a United States Post Office or mailbox, with first class postage prepaid, addressed to the counsel of record at his post office address. Since there is no postal pick-up at the Colby, Wisconsin, post office after 6:30 P. M., on any Saturday, a mailing of the record in this case after that hour on Saturday would have resulted in the record not being on its way until Monday, October 2, the date when, in fact, the record was mailed to the Clerk of the Supreme Court of the United States.

Under date of July 18, 1961, Mr. Wayne A. Roberts, a Chief Deputy Clerk in the office of the Clerk, United States Court of Claims, wrote the attorney for the petitioner as follows:

> "The request for record in re certiorari in the above entitled case has been received in this office, and the record is in the process of being assembled.
>
> Upon receipt of the required $5.00 charge for preparing and certifying the record, it will be mailed to you. As the testimony and exhibits are rather bulky, it is suggested that we mail them directly to the office of the Clerk of the Supreme Court when we have been notified that the record has been filed with them. However, if you would like to have them sent to you, we will do so. In any event, the "record" will be sent to you."

Under date of September 12, 1961, the attorney for the petitioner wrote the Hon. Willard L. Hart, Clerk of the United States Court of Claims in reference to this matter as follows:

> "It is requested that you mail the testimony and the exhibits directly to the office of the Clerk of the Supreme Court, as you suggest in your letter of July 18, 1961."

In response to that letter of the attorney for the petitioner, the Chief Deputy Clerk of the United States Court of Claims mailed the attorney for the petitioner a receipt dated September 15, 1961, indicating the receipt of $5.00 and, "preparing and certifying record in re certiorari". No further communication was had between the office of the Clerk of the United States Court of Claims and the attorney for the petitioner and on the basis of the request of September 12, 1961, from the petitioner's attorney and the responsive receipt indicating that the record had been prepared and certified led the petitioner to believe that the record had in fact been certified to the office of the Clerk of the Supreme Court of the United States. Petitioner had no notice that the record had not been filed with the Clerk of the Supreme Court of the United States until a telephone call was received from the office of the Clerk of the Supreme Court of the United States on October 2, 1961, advising of the receipt of the petition for writ of certiorari in this matter and indicating that a transcript of the record in the case had not been filed by the Clerk of the United States Court of Claims. Petitioner then immediately telephoned the Clerk of the United States Court of Claims to inquire as to why the transcript of the record in the case had not been filed and the Clerk of the United States Court of Claims then immediately forwarded the transcript and exhibits to the office of the Clerk of the Supreme Court of the United States.

Since the rules of the Supreme Court were technically complied with by a timely deposit of the record in the United States mail and since it was through no fault of the petitioner herein

that the record had not been filed with the Clerk of the Supreme Court, petitioner respectfully submits that the application for certiorari was made within the time limited, and that the Court does have jurisdiction under 28 U.S.C. 2101(c).

Respectfully submitted.

FRANK L. NIKOLAY

Attorney for Petitioner.